

Nebraska Law Review

Volume 43 | Issue 1

Article 9

1963

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Recommended Citation

Marvin D. Keller, *Terminating a Marriage in Nebraska*, 43 Neb. L. Rev. 156 (1964)

Available at: <https://digitalcommons.unl.edu/nlr/vol43/iss1/9>

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TERMINATING A MARRIAGE IN NEBRASKA

I. INTRODUCTION

As the basic unit in society,¹ the family has long been the subject of considerable legal attention. Such attention has been primarily concerned with the procedures for establishing and dissolving the marital status. Because of a greatly increased divorce rate and a more complete understanding about the causes of marital breakup, increasing criticism is being directed toward the failure of statutory divorce provisions to adapt to the changing attitudes of society.² An example of this is Nebraska where except for the enforcement of support,³ the law of divorce remains basically the same as it was in 1856.⁴ It is the purpose of this comment to re-examine those portions of Nebraska divorce law pertaining to the actual termination of marriage, and to analyze such law in the light of modern understanding and attitudes.

II. TERMINATION OF THE MARRIAGE

A. THE STATUTES

Absolute divorce, which always has been recognized in the United States, was not permitted under the early canon law. The canon law viewed divorce as sinful and provided only for a procedure whereby parties could legally separate without severing the bonds of matrimony: divorce *a mensa et thoro*.⁵

¹ "The institutions comprising the marriage and family system have their roots in the elemental needs of the very first social groupings formed among men. They have been and are universal in some form among all known societies." HERTZLER, *AMERICAN SOCIAL INSTITUTIONS* 224 (1961).

² See, e.g., VIRTUE, *FAMILY CASES IN COURT* (1956); Alexander, *Let's Get the Embattled Spouses out of the Trenches*, 18 *LAW & CONTEMP. PROB.* 98 (1953); Bradway, *Divorce Litigation and the Welfare of the Family*, 9 *VAND. L. REV.* 665 (1956); Kahn & Freund, *Divorce Law Reform?* 19 *MODERN L. REV.* 573 (1956); Johnson, *Suppressed, Delayed, Damaging and Avoided Divorces*, 18 *LAW & CONTEMP. PROB.* 72 (1953); McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 *VAND. L. REV.* 685 (1956).

³ E.g., Uniform Reciprocal Enforcement of Support Act, *NEB. REV. STAT.* §§ 42-701 to -721 (Reissue 1960).

⁴ *Neb. Laws c. 52*, p. 277 (1856).

⁵ Mueller, *Inquiry into the State of a Divorceless Society*, 18 *U. PITT. L. REV.* 545, 545-52 (1957).

The ecclesiastical courts, under the canon law, adhered to the concept of marriage as a sacrament which no man could dissolve. At the same time, however, it was recognized that in certain situations the spouses should not be forced to live together. To come within these situations and obtain a divorce *a mensa et thoro* required that one spouse be guilty of either adultery or cruelty. The limited divorce for adultery rested on the basis that a heinous crime had been committed against the marital relationship, and the innocent spouse should not be required to continue performance of marital obligations.⁶ A limited divorce for cruelty could be obtained only where the acts complained of constituted a "danger to life, limb, or health."⁷ It was a protective device.

When divorce jurisdiction was taken from the ecclesiastical courts and placed in the hands of the secular courts,⁸ the above grounds and desertion were the only ones adopted by statute.⁹ Apparently the common law tradition of adversary proceedings also carried over.¹⁰

Only after the Protestant movement had gained considerable strength was absolute divorce recognized.¹¹ The first provisions for absolute divorce were equally strict, the grounds for the action not being extended at all.¹² The requirement that a serious offense be committed as a condition precedent to the granting of a divorce still predominated. Even desertion had to be willful and continuous over a stated period of time.¹³ Grounds under which absolute divorce could be obtained were gradually extended, but present divorce laws, with few exceptions,¹⁴ continue to require some degree of guilt or fault on the part of one of the parties.¹⁵

⁶ Mueller, *supra* note 5, at 553.

⁷ Evans v. Evans, 1 Hag. Con. 35, 161 Eng. Rep. 466 (1790).

⁸ The Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85.

⁹ The Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85.

¹⁰ Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 LAW & CONTEMP. PROB. 3, 4 (1953).

¹¹ Rheinstein, *supra* note 10, at 3-19.

¹² The Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85.

¹³ JACOBS & GOEBEL, DOMESTIC RELATIONS 419 (4th ed. 1961).

¹⁴ The grounds which do not require guilt are insanity, incompatibility and living apart and separate. See ARK. STAT. ANN. § 34-1202 (1953) (living apart and separate); NEB. REV. STAT. § 42-301 (Reissue 1960) (insanity); N.M. STAT. ANN. § 22-7-1 (1953) (incompatibility).

¹⁵ NEB. REV. STAT. §§ 42-301 and -302 (Reissue 1960).

The first statute in Nebraska was enacted in January, 1856, and contained essentially the same elements as the present day divorce law.¹⁶ Grounds for obtaining a divorce, under present as well as past provisions, are adultery, cruelty, desertion, abandonment, insanity, drunkenness, three or more years imprisonment, a sentence of life imprisonment, and physical incompetence at the time of marriage.¹⁷ It is apparent that all except insanity are based on the fault theory without regard to the actual state of the marriage. The Nebraska Supreme Court summed up this legal attitude by stating:¹⁸

A divorce or legal separation must be grounded on *legal fault* within the grounds enumerated in the statutes. . . . It is not the province of the courts to grant such decrees for sociological reasons. . . . It is not for this court to do what it deems best for the parties.

Divorce is traditionally treated in much the same manner as other adversary proceedings between a guilty party and a party supposedly injured thereby. The spouse seeking to terminate the marriage must file a petition alleging a marital offense which constitutes statutory grounds for divorce.¹⁹ The husband or wife then becomes the defendant in the action and enters his defense, or, as is more often true, fails to defend.²⁰ Proof of the defendant's guilt is required, and, if established, the divorce is granted to the complaining spouse.

That the fault theory is firmly entrenched in Nebraska law is indicated by the fact that the commission of a marital offense cannot be proven with the confessions or admissions of the spouses alone. The Nebraska statutes specifically provide that the testimony of the parties must be corroborated by other witnesses.²¹ This requirement is a direct parallel of the criminal law requirement that there be corroborative evidence to support a defendant's confessions.²² It should be noted, however, that, even in the criminal law, a confession in open court need not be corroborated.

¹⁶ Neb. Laws c. 52, p. 277 (1856).

¹⁷ NEB. REV. STAT. §§ 42-301 and -302 (Reissue 1960).

¹⁸ Shoemaker v. Shoemaker, 166 Neb. 164, 168, 88 N.W.2d 221, 226 (1958); Birth v. Birth, 165 Neb. 11, 14, 84 N.W.2d 204, 205 (1957); Robinson v. Robinson, 164 Neb. 413, 417, 82 N.W.2d 550, 553 (1957). (Emphasis added.)

¹⁹ NEB. REV. STAT. § 42-307 (Reissue 1960).

²⁰ JACOBSON, AMERICAN MARRIAGE AND DIVORCE 120, table 57 (1959).

²¹ NEB. REV. STAT. § 42-335 (Reissue 1960).

²² Gallegos v. State, 152 Neb. 831, 43 N.W.2d 1 (1950).

The hardship which the corroboration requirement can work is aptly illustrated by *Birth v. Birth*,²³ where the plaintiff testified that her husband "had brutally made grossly excessive demands upon [her] for sexual relations which had so affected her physical and mental health as to make it impossible to continue the marriage relation."²⁴ The divorce was denied because there was *no corroborative evidence*. It thus appears that a party seeking to terminate his marriage must have at least one witness to verify even the most personal and intimate events in marriage.

B. SOCIETAL ATTITUDE

While divorce law has remained stable over the years, vast moral and social changes have taken place. Between 1865 and today the national divorce rate has increased nearly eight times,²⁵ indicating that the stigma once attached to such proceedings has lost the steadfast support of the public.

One significant factor in the increased acceptance of divorce has undoubtedly been the emancipation of women. Whereas an important consideration initially was to restrain a man from obtaining a divorce and leaving his spouse as a burden on society, the same is no longer of such primary importance. Women are no longer totally dependent upon their husbands for support. They now constitute a significant portion of the working force,²⁶ can hold title to real estate,²⁷ have the ability to enter into contracts,²⁸ and can bring suit in their own names.²⁹ They are able, therefore, to be relatively independent in maintaining themselves. The effect of this independence has been propounded by one writer who states:³⁰

Although we do not know the figures, we can and must assume that the great event of female emancipation has brought with it an in-

²³ 165 Neb. 11, 84 N.W.2d 204 (1957).

²⁴ *Id.* at 11-12, 84 N.W.2d at 204.

²⁵ JACOBSON, *op. cit. supra* note 20, at 90, table 42.

²⁶ There were over twenty-two million women employed in 1959 out of a total labor force of about forty-eight million. This compares with less than two million out of a total labor force of about thirteen million in 1870. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 205, No. 261, No. 262 (1959).

²⁷ NEB. REV. STAT. § 42-201 (Reissue 1960).

²⁸ NEB. REV. STAT. § 42-202 (Reissue 1960).

²⁹ NEB. REV. STAT. § 42-201 (Reissue 1960).

³⁰ Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 654 (1956).

crease in the number and rate of cases of factual marriage breakup. Since it is probable that at least some of these cases have been followed by formalization through divorce, we are justified in assuming that to some extent the rise in the number and rate of divorce is connected with the change in the social position of the female half of the population.

Another important factor which has contributed to an increasing divorce rate is the high mobility of today's society. Most families presently live in a society where they are relatively anonymous, and there are few friends or relatives permanently close by.³¹ Without the discipline engendered by a stable, closely knit society, couples are less restrained in their desire to separate.³²

Also indicative of the changing social attitude is the increasing questioning of the guilt requirement in divorce actions.³³ This mounting stream of criticism has come from lawyers, sociologists and psychologists asserting that: (1) the fault requirement has no basis in fact because marriage breakup is usually the fault of both spouses;³⁴ and (2) the legal grounds for divorce are technical terms which do not define the real causes of marital discord.³⁵

Such criticism is based on the growing sociological evidence that most marriages fail, not because of one spouse's act which constitutes a ground for divorce, but because of conflicting personality factors which cause a gradual deterioration of the marriage relationship³⁶ until at some point the essentials of the marriage relationship are destroyed.³⁷ In this situation, the fault requirement is likely to cause one party to commit an offense which provides grounds for divorce.³⁸ The marriage relationship, however, is, *de facto* dead before such grounds are provided. Yet, in the divorce court, the spouse with grounds for divorce is adjudged "in-

³¹ HERTZLER, *AMERICAN SOCIAL INSTITUTIONS* 245-52 (1961).

³² HERTZLER, *supra* note 31, at 245-52.

³³ See note 2 *supra*.

³⁴ ERNST & LOTH, *FOR BETTER OR WORSE* 24 (1951); MERTON & NISBET, *CONTEMPORARY SOCIAL PROBLEMS* 437 (1961).

³⁵ JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 126 (1959); GOODE, *AFTER DIVORCE* 114 (1956); Johnson, *Suppressed, Delayed, Damaging and Avoided Divorces*, 18 *LAW & CONTEMP. PROB.* 72, 85 (1953).

³⁶ MERTON & NISBET, *op. cit. supra* note 34, at 425-37.

³⁷ This is a test that many courts use to determine whether a divorce should be granted. The test is ordinarily used in the cruelty situation, See *e.g.*, *DeWaal v. DeWaal*, 148 Neb. 756, 29 N.W.2d 371 (1947).

³⁸ GOODE, *op. cit. supra* note 35, at 136; MERTON & NISBET, *op. cit. supra* note 34, at 435-37.

nocent" and the other "guilty" even though these terms are meaningless when related to the cause of marital disintegration.

Present divorce actions are seldom contested and, when there is a contest, it usually centers around alimony, support and custody of children.³⁹ This lack of adversity in a supposedly adversary proceeding serves to further weaken the value of the present statutory grounds for divorce. Over half of the divorces in Nebraska are granted on the ground of cruelty, for example, because cruelty is easy to prove in an uncontested action,⁴⁰ and probably attaches less stigma to the defendant than would other grounds. Thus, a complaining spouse tends to choose grounds on the ease of procuring a divorce and the relative lack of stigma, even though, under the fault theory, other grounds might be more appropriate. As stated by one writer:⁴¹

The "causes of divorce" however defined, bear little relationship to the tabulations of divorce complaints as they appear in divorce suits. In general the rule in such suits is that the *legally most effective* and the *morally least accusatory* grounds are asserted in the suit.

New York, where the only ground for divorce is adultery,⁴² illustrates the inherent weakness of the fault theory as a basis for the law. Apparently few cases of actual adultery come before the New York courts. The allegation of adultery, however, is often employed as a sham for the purpose of terminating a marriage.⁴³ One spouse, usually the husband, agrees to provide evidence of adultery for the other. The evidence of inclination and opportunity is usually provided by professional correspondents,⁴⁴ and is placed before the court by the so-called innocent spouse. No defense is entered and the divorce is granted.⁴⁵

³⁹ JACOBSON, *op. cit. supra* note 35, at 120.

⁴⁰ In a uncontested divorce action where the grounds are cruelty, the questions which will be asked the plaintiff have been reduced to a formula, and the answers are as predictable. See VIRTUE, *FAMILY CASES IN COURT* 89-90 (1956).

⁴¹ GOODE, *op. cit. supra* note 35, at 114. (Emphasis added.)

⁴² N.Y. DOM. REL. LAW, C.P.A. 1147 (1957).

⁴³ JACOBSON, *op. cit. supra* note 35, at 115-16.

⁴⁴ "As a matter of fact, it has been common knowledge for several decades that the situation in New York has resulted in the appearance of a new remunerative occupation—that of the professional co-respondent." JACOBSON, *op. cit. supra* note 35, at 115.

⁴⁵ JACOBSON, *op. cit. supra* note 35, at 115-16.

III. DEFENSES TO DIVORCE ACTIONS

Although the usual divorce action is non-contested, there are occasional situations where one spouse decides to contest.⁴⁶ If the defendant wishes to contest an action for divorce he may have one or several defenses available, any of which would defeat the action in Nebraska. There are four main defenses—recrimination,⁴⁷ collusion,⁴⁸ condonation,⁴⁹ and insanity⁵⁰—which, if proven, act as an absolute bar to divorce.⁵¹ These defenses, like the grounds for the action, are based upon or arise from the fault theory.

A. RECRIMINATION

Recrimination is used to bar a decree of divorce where both parties are guilty of a marital offense constituting grounds for divorce. This defense existed under the canon law and has been carried over into the statutory law of most states.⁵²

Courts have advanced a number of justifying reasons for continued use of the defense against a guilty plaintiff. Since divorce arises in equity, the most familiar doctrine relied upon is that the

⁴⁶ There can be a number of reasons for defending a divorce action. The defendant (1) may want to continue living with his spouse; (2) may have religious objections to divorce; (3) might be afraid that he will not be permitted to visit or see his children; (4) might consider defending a method of avenging injured feelings; or, (5) might not, in the husband's situation, wish to be required to make the alimony and support payments.

⁴⁷ NEB. REV. STAT. § 42-304 (1960).

⁴⁸ NEB. REV. STAT. § 42-304 (1960).

⁴⁹ *Sewell v. Sewell*, 160 Neb. 173, 178, 69 N.W.2d 549, 553 (1955). "An obstacle to the success of the case of appellee is condonation by her as a result of the foregoing recited facts of any and all breaches of marital duties by appellant to the time of their separation on the day of the institution of this case."

⁵⁰ *Stephens v. Stephens*, 143 Neb. 711, 716, 10 N.W.2d 620, 623 (1943); *Anderson v. Anderson*, 89 Neb. 570, 574, 131 N.W. 907, 908-09 (1911); *Kirkpatrick v. Kirkpatrick*, 81 Neb. 627, 116 N.W. 499 (1908); *Scheick v. Scheick*, 5 Neb. (Unof.) 142, 97 N.W. 474 (1903); *Walton v. Walton*, 57 Neb. 102, 77 N.W. 392 (1898).

⁵¹ "No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties, nor where the party complaining shall be guilty of the same crime or misconduct charged against the respondent." NEB. REV. STAT. § 42-304 (1960).

⁵² *Gradwohl, The Doctrine of Recrimination in Nebraska*, 37 NEB. L. REV. 409, 410-11 (1958).

plaintiff must come into the action with "clean hands."⁵³ Under this doctrine, equitable relief is intended only for an innocent injured party, and the court will not grant relief to one who has contributed to the injury.⁵⁴

Another justification frequently used is that the parties are in *pari delicto*.⁵⁵ Under this doctrine, where each party is equally at fault the courts will leave the case as they find it. Although this is much like the "clean hands" justification, there is a distinction. "Clean hands" is based on the principle that the court cannot provide relief to a guilty party. The *pari delicto* justification is based on a theory of equal guilt which affords neither party greater rights than the other so neither is entitled to relief as against the other.⁵⁶

Since marriage has been considered to be in the nature of a contract, some courts, in denying relief, occasionally say there has been a breach of mutually dependent covenants.⁵⁷ This analogy to contract law is applied even though the marriage relationship is essentially a status rather than a contract.⁵⁸

The Nebraska statute dealing with this defense provides, "No divorce shall be decreed in any case . . . where the party complaining shall be guilty of the *same* crime or misconduct charged against the respondent."⁵⁹ The clear language requires that for misconduct to be a defense it must be the same misconduct—adultery in an action for adultery, etc. The Nebraska Supreme Court, however, has greatly expanded the scope of the statute by stating, "[I]f the

⁵³ Malkan, *Petitioners' Fault in Matrimonial Actions*, 106 U. PA. L. REV. 52, 61 (1957).

⁵⁴ "To obtain a release *a vinculo matrimonii*, the applicant must be without reproach, and however guilty the defendant, if the applicant is chargeable either with similar guilt, or of an offense to which the law attaches similar consequences, the relief must be denied . . ." McKnight v. McKnight, 5 Neb. (Unof.) 260, 267, 98 N.W. 62, 65 (1904).

⁵⁵ 1 POMEROY, EQUITY JURISPRUDENCE §§ 402, 403 (4th ed. 1918).

⁵⁶ *Juda v. Juda*, 327 Mich. 321, 41 N.W.2d 883 (1950).

⁵⁷ *Beeby v. Beeby*, 1 Hag. Ecc. Rep. 789, 162 Eng. Rep. 755 (1799); *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717 (1858).

⁵⁸ "The doctrine of recrimination has been rested . . . upon the contract theory that he who seeks redress for the violation of a contract resting on mutual and dependent covenants must himself have performed the obligations on his part. . . . [I]t ignores the fact that marriage is not a mere private contract but rather a status . . ." *Burch v. Burch*, 195 F.2d 799, 809 (3d Cir. 1952).

⁵⁹ NEB. REV. STAT. § 42-304 (1960). (Emphasis added.)

conduct of both parties to a divorce action has been such as to furnish grounds for divorce, neither is entitled thereto although the conduct of one has been grossly more culpable than the other."⁶⁰

It is apparent, therefore, that the court, disregarding the limitation in the statute, has adopted a theory closely akin to the "clean hands" doctrine in applying recrimination.⁶¹

B. COLLUSION

The guilt requirement, which serves as the basis for present divorce law, has given rise to another kind of guilt which will also bar a decree.⁶² Parties who find their marriage failing because of sociological and psychological factors, often beyond their understanding and control, have no remedy unless one of them has committed a marital offense sufficient to constitute grounds for divorce. As in the New York divorce proceedings, the requirement of fault often provokes collusive activity between parties attempting to provide such grounds.

Collusion is a bar to divorce which arises in Nebraska when the husband and wife have agreed to withhold facts from the court to avoid recrimination, or where they have agreed to testify falsely to provide the necessary grounds for a divorce.⁶³ Where both parties have acted to defraud the court, under the rules of equity, either is estopped to plead the collusion as a defense.⁶⁴ To permit such fraudulent representations, however, would encourage disrespect for the legal process and destroy the concept of justice upon which equity is based. The court, therefore, will, on its own motion, set aside a collusive divorce or refuse to grant the divorce if the collusion is brought to the court's attention prior to rendering the divorce decree.⁶⁵

⁶⁰ *Studley v. Studley*, 129 Neb. 784, 787, 263 N.W. 139, 140 (1935).

⁶¹ An analysis of all the Nebraska cases involving recrimination shows a great deal of judicial inconsistency in the application of the doctrine. It is, therefore, rather difficult to determine which justification the Nebraska Supreme Court uses. See Gradwohl, *The Doctrine of Recrimination in Nebraska*, 37 NEB. L. REV. 409 (1958).

⁶² JACOBS & GOEBEL, *DOMESTIC RELATIONS* 480-87 (4th ed. 1961).

⁶³ *Winder v. Winder*, 86 Neb. 495, 125 N.W. 1095 (1910); *Mohr v. Mohr*, 81 Neb. 499, 116 N.W. 267 (1908); *Branson v. Branson*, 76 Neb. 780, 107 N.W. 1011 (1906); *Davis v. Hinman*, 73 Neb. 850, 103 N.W. 668 (1905); *Wisdom v. Wisdom*, 24 Neb. 551, 39 N.W. 594 (1888).

⁶⁴ *Hartigan v. Hartigan*, 272 Ala. 67, 128 So. 2d 725 (1961).

⁶⁵ *Hartigan v. Hartigan*, 272 Ala. 67, 128 So. 2d 725 (1961).

C. CONDONATION

Condonation may be a defense where the defendant spouse can prove that the injured spouse forgave the alleged offense.⁶⁶ This defense is based on an estoppel theory, the condoning spouse being deemed to have waived the grounds for divorce. Since the injured party willingly forgave the offense, it is reasoned that no offense was actually committed against the marriage relationship.⁶⁷ The guilty spouse supposedly relied on the forgiveness and should not have the offense charged against him later.

Condonation, however, may be avoided, for the condoned act may be revived by subsequent acts of the same nature by the forgiven spouse. According to the court, the injured spouse only forgives conditionally, the condition being that the forgiven spouse will not subsequently commit such an offense against the marriage relationship.⁶⁸

This defense can have the effect of preventing reconciliations. If the injured spouse wishes to attempt to save the marriage, he is placed in the position of having to make a choice between attempted reconciliation and preservation of the ground for divorce. Should an attempted reconciliation fail, the injured spouse is unable to sue for divorce because of the defense of condonation.⁶⁹

D. INSANITY

Insanity during commission of a marital offense does not exist as a defense under the statutes. It is a court conceived defense resting on the principle that an insane person cannot be guilty because he can form no intent to commit the offense.⁷⁰

⁶⁶ Sewell v. Sewell, 160 Neb. 173, 178, 69 N.W.2d 549 (1955).

⁶⁷ Greco v. Greco, 2 W. W. Harr, (Del.) 242, 121 Atl. 666, (1923); Christensen v. Christensen, 125 Me. 397, 134 Atl. 373 (1926).

⁶⁸ There seems to be no real revival problem in Nebraska. The usual statement in other courts is that the condonation is conditional upon the implied promise of the guilty spouse to treat his mate with "conjugal kindness." Because of the "conjugal kindness" condition it is usually held that a lesser offense will revive the condoned offense. Lawton v. Lawton, 77 R.I. 333, 75 A.2d 199 (1950); Hilbert v. Hilbert, 168 Md. 364, 177 Atl. 914 (1935). Nebraska, however, appears to require an act which would in and of itself provide grounds for divorce to revive the condoned offense. Cowan v. Cowan, 160 Neb. 74, 69 N.W.2d 300 (1955); Hodges v. Hodges, 154 Neb. 178, 47 N.W.2d 361 (1951); Wright v. Wright, 153 Neb. 18, 43 N.W.2d 424 (1960); Eicher v. Eicher, 148 Neb. 173, 26 N.W.2d 808 (1947).

⁶⁹ Johnson, *supra* note 35, at 80.

⁷⁰ Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N.W. 499 (1908).

Under the fault theory, therefore, the injured spouse has no grounds for a divorce.

Few cases have arisen in Nebraska in which insanity was claimed as a defense. One case has applied insanity as a defense to a divorce action based on desertion.⁷¹ The court, using the requirement that the desertion be willful, denied the divorce saying that the defendant could not willfully continue to desert, if before the end of the statutory two year period he became insane. Other cases appear by way of dictum to approve of insanity as a defense, but the Nebraska Supreme Court has never defined the elements necessary to prove insanity in a divorce action. Presumably, since divorce is based on a showing of guilt, the proof of insanity would be comparable to the tort and criminal law requirements.⁷²

IV. ANALYSIS OF FAULT THEORY

As shown above, the provisions for divorce have, since the ecclesiastical courts, been predicated on the proof of grounds, which in turn required a showing of guilt and innocence. The procedures and rules growing out of this requirement have remained stable throughout years of vast social change, and it becomes pertinent, therefore, to consider their continued validity. An examination of the results flowing from the fault theory will aid in determining whether its retention is desirable, and also indicate any areas in need of alteration.

A. GENERAL CONSEQUENCES OF NEBRASKA DIVORCE LAW

The public and adversary nature of a divorce proceeding under the fault theory has two unfortunate results. First, it is a humiliating ordeal for both parties to the action. The "guilty" spouse hears the testimony of his misconduct from much the same position as a criminal defendant,⁷³ and the "innocent" spouse must publicly reveal personal and intimate abuses to prove the necessary grounds. This humiliation caused by the criminal overtones and notoriety leads to a second result—the spouses are reluctant to relate more than the facts necessary to establish grounds. Such reluctance to testify appears to be borne out by studies which show that less

⁷¹ *Kirkpatrick v. Kirkpatrick*, 81 Neb. 627, 116 N.W. 499 (1908).

⁷² See *e.g.*, *Stephens v. Stephens*, 143 Neb. 711, 716, 10 N.W.2d 620 (1943); *Anderson v. Anderson*, 89 Neb. 570, 577, 131 N.W. 907 (1911).

⁷³ *DESPERT, CHILDREN OF DIVORCE* 189 (1953); *Bradway, Divorce Litigation and the Welfare of the Family*, 9 VAND. L. REV. 665, 672 (1956).

than 10% of the cases are contested.⁷⁴ A contest effectively heightens the atmosphere of criminality, whereas an uncontested proceeding allows the parties to keep a greater portion of their private lives from public observation.

Even where a contest is involved, the reluctance to testify forces the court to render its judgment with few pertinent facts.⁷⁵ Only a limited account of the actual causes behind a marital breakup is presented to the court, and to expect equitable determinations in such a situation places much reliance on the clairvoyant abilities of the court.

Where a determination of the guilt of one or both of the spouses is the controlling issue, the courtroom, at times, becomes an arena for name calling and the airing of minor grievances.⁷⁶ Where children are involved, their support and protection is shifted to the background while they become one of the primary objects of the action.⁷⁷

The resentment of one partner toward the other in the failing marriage also takes its toll of the relationship between the parents and children. A man and woman who have hurt each other in marriage may unconsciously continue their war with each other through a divorce and afterward with the child as a pawn 'The mother *wins* the custody'—This is the way it is put in both legal and popular parlance, as though divorce were a battle in which the reward of victory is the child. And all too often it is a battle, whether or not the true issues appear on the surface.

Not only is the welfare of the child largely ignored under the present state of divorce litigation; but the welfare of the spouses, as such, does not appear to be an important issue. Divorce provides for a termination and a chance for a fresh start, but both parties are often left with a feeling of frustration and failure.⁷⁸ With their marital failure compounded by a guilt hangover from the recent litigation, they could hardly be expected to look forward to new matrimonial contacts with any great optimism. Yet the human drive for companionship requires that they attempt such a contact.⁷⁹ This is borne out by statistical studies which show that the

⁷⁴ JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 120 (1959).

⁷⁵ See generally, Bradway, *supra* note 73.

⁷⁶ Alexander, *Let's Get the Embattled Spouses out of the Trenches*, 18 *LAW & CONTEMP. PROB.* 98 (1953).

⁷⁷ DESPERT, *op cit. supra* note 73, at 28. (Emphasis in the original.)

⁷⁸ GOODE, *AFTER DIVORCE* 173-201 (1956).

⁷⁹ ANSHEN, *THE FAMILY: ITS FUNCTION AND DESTINY* 3-38 (1949); HERTZLER, *AMERICAN SOCIAL INSTITUTIONS* 224-58 (1961).

divorcee has a far greater propensity to marry than the single person who has never been married.⁸⁰ Considering the ordeal which divorce litigation involves, however, there is certainly some question about how readily the divorcee will adjust to a subsequent marriage.⁸¹

The present fault theory presents yet another problem in its conflict with the state's interest in the welfare of its citizens. By enacting statutes purporting to regulate divorce, the state has indicated an interest in marital stability.⁸² The present guilt requirements for divorce, contrary to this interest, do not contribute to marriage stability and may in fact promote instability and conditions which are harmful to the parties involved.⁸³ The law does not now provide a remedy for the marriage which becomes bankrupt because of incompatible personalities. Rather it requires that the relationship deteriorate to a point where one spouse is driven to commit an act constituting grounds for divorce.⁸⁴ The period of time which can elapse between the psychological breakup and legal dissolution can be quite long.⁸⁵ Where there is a lengthy delay

⁸⁰ GOODE, *op. cit. supra* note 78, at 207; JACOBSON, *op. cit. supra* note 74 at 82.

⁸¹ JACOBSON, *op. cit. supra* note 74, at 150.

⁸² "If statistics on divorce would reflect the actual occurrence of marital breakup, marriage stability would be perfect in all those countries in which the divorce rate is zero, *i.e.*, in those countries which do not have the institution of divorce at all. . . . Does this fact indicate, however, that no Italian, Spanish or Brazilian husband ever abandons his wife, that no wife ever runs away from her husband, that no couples in these countries ever separate, that no married man maintains a mistress and no married woman ever has a lover? Anyone who has even a fleeting acquaintance with the social structures of these countries will make no such allegation." Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 643-44 (1956). See also, Mueller, *Inquiry into the State of a Divorceless Society*, 18 U. PITT. L. REV. 545 (1957).

⁸³ "Yet divorce is not the costliest experience possible to a child. Unhappy marriage without divorce — what we call *emotional divorce* — can be . . . far more destructive to him than divorce." DESPERT, *op. cit. supra* note 73, at 18. (Emphasis in the original.)

⁸⁴ "We suggest, then that in our society the husband more frequently than the wife will engage in behavior whose function, if not intent, whose result, if not aim, is to force the other spouse to ask for the divorce first. Thereby the husband frees himself to some extent from the guilt burden, since he did not ask for the divorce." GOODE, *op. cit. supra* note 78, at 136. (Emphasis in the original.)

⁸⁵ "Many American (and foreign) jokes suggest that divorces in this country are precipitate and based upon whim. The evidence is clear, however, that divorcees do not characteristically dash for the nearest

between "emotional divorce" and legal divorce, the psychological effect on parents as well as on children is likely to be harmful.⁸⁶

The suffering of children where the divorce is emotional, but not openly expressed, is greater. Loyalties are divided, security is deeply shaken, and besides there is anxiety about the uncertain, the unexpressed and inexpressible. The child of emotional divorce cannot ask to have his confusions clarified and his fears explained away. He does not know what he fears and has no words for what he does not understand. The unidentified situation between his parents is far more threatening to a child than a realistic situation, however painful, which is squarely faced together with his parents.

There is a tendency for the child reared in the emotional divorce situation to carry the psychological impact of that life into adulthood.⁸⁷ Having lived through one such situation, he may approach his own marriage with a negative attitude. Thus, in preventing legal divorce except on a showing of guilt, the state seems actually to be working against the best interests of its citizens.

B. RESULT OF THE FAULT THEORY AS RELATED TO THE DEFENSES

The defenses of recrimination, collusion, condonation and insanity were discussed in an earlier section to show that they shared a common fault theory basis. At this point it is pertinent to determine their relationship to marriage stability.

1. Recrimination

Strict application of recrimination has the result of legally enforcing marriages after they have reached the highest degree of disintegration. Deterioration of the marriage relationship has progressed considerably beyond minor personality conflicts, and both parties have committed serious breaches of the marital bond.⁸⁸ Whether with conscious intent or not, each spouse has seriously injured the other. Refusal to provide relief under such conditions can only have a destructive effect on the mental welfare of the spouses and their children.

Furthermore, the fact that recrimination is available tends to promote collusion between the spouses who feel that divorce is

lawyer when the first spat occurs. Divorces are preceded by a long period of conflict, and the final action is the result of a decision and action process that lasts on the average about two years." Goode, *op cit. supra* note 78, at 137.

⁸⁶ DESPERT, *op. cit. supra* note 73, at 25.

⁸⁷ MERTON & NISBET, *CONTEMPORARY SOCIAL PROBLEMS*, 425 (1961).

⁸⁸ See discussion of the elements of recrimination, *supra* note 52 and following.

the only practical solution to their problems. Knowing that recrimination could be available, the defendant spouse, if he desires divorce, is induced to conceal facts from the court. Or a defendant husband who has a recriminatory defense available may threaten to use it, with the intent of coercing his wife into requesting inadequate alimony and support payments.⁸⁹

The modern attitude toward divorce and the results of sociological and psychological studies which indicate that there is rarely, if ever, an innocent spouse militate against retention of the defense.⁹⁰ Divorce should have the purpose of benefiting the members of the family through dissolution of a relationship which, because of a constant atmosphere of bickering and dissension, is detrimental to the welfare of the individual members of the family. The use of recrimination as a defense forecloses the possibility of protecting members of the family, particularly children, from the worst kind of marital discord.

2. Collusion

Collusive action between the spouses cannot, of course, be condoned; for such action constitutes an attempt to defraud the courts. Continued activity of this nature leads to open contempt for the legal process.⁹¹ But, as has been previously indicated, the primary factor which leads to collusive action is the guilt requirement. The collusion problem, therefore, clearly illustrates the in-

⁸⁹ "The spouse who more desperately seeks an end to a hopeless union is penalized by the ability of the other spouse to prevent a divorce through the assertion of a recriminatory defense, and the more unscrupulous partner may obtain substantial financial concessions as the price of remaining silent." *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 869, 250 P.2d 598, 604 (1952).

⁹⁰ "Yet it is perfectly apparent to any student of divorce that a divorce seldom can be painted in black and white; both partners are guilty and both are innocent as a rule." ERNST & LOTH, *FOR BETTER OR WORSE* 17 (1951). See also, Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377 (1937).

⁹¹ "The courts have thus come to tolerate collusive practices through which consent divorces can be easily obtained in spite of their reprobation by the official law. Such practices have grown up in a good many places, but quite especially in this country, where unorganized trends, even of large numerical strength, are finding it particularly difficult to influence the legislatures. This discrepancy between the law of the books and the law in action, which we find in so many states, has, through its tolerance or promotion of collusive practices and perjury, developed into a serious threat to the morals of the bar and the respect for law among the public." Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 LAW & CONTEMP. PROB. 3, 19 (1953).

ability of divorce laws resting on fault theory to effectively deal with marital problems in a realistic manner.

Although collusion should be discouraged, it is submitted that the method of reducing its incidence should not be the refusal to grant a divorce decree. Such refusal may be an effective punishment of the guilty parties, but marriage should not be utilized as a punitive device. Furthermore, the punishment affects innocent parties as much as it does the spouses. Children, though never involved in the collusion, are punished as severely as their parents because they are forced to remain in a family atmosphere permeated with strife.

The solution to the collusion problem lies not in punishing the parties, but in curing the defects in divorce theory which tend to promote such action. If divorce law rested on a basis which encouraged complete disclosure to the court, the reasons for resorting to collusion would disappear.⁹²

3. *Condonation*

One of the primary goals in divorce practice should be to encourage reconciliation between the spouses where it is practicable to do so.⁹³ Attempts to promote reconciliation in some jurisdictions have been quite successful.⁹⁴ The defense of condonation, however, has a directly contrary affect. That is, the spouse who has grounds for divorce is forced to choose between reconciliation and forfeiture of grounds for divorce. Should the injured spouse attempt to effectuate a reconciliation and fail, the grounds for divorce would have been condoned, and such condonation could be pleaded in bar of the divorce action.⁹⁵ Such is the anomolous result of basing divorce on a consistent legalistic fault concept.

⁹² The present state of divorce law does not encourage complete or truthful disclosure to the courts because of the emphasis on grounds and defenses. The spouses are not permitted to ask for a divorce merely because their marriage is a failure. They must first establish grounds for the divorce and in so doing avoid doing any act which could bring a defense into play. The easier way is to allege false grounds in a non-contested action. If, however, the emphasis were taken away from the technical grounds no purpose can be served in resorting to collusive practices. See Rheinstein, *supra* note 91.

⁹³ Bradway, *Divorce Litigation and the Welfare of the Family*, 9 VAND. L. REV. 665, 680-84 (1956); Chute, *Divorce and the Family Court*, 18 LAW & CONTEMP. PROB. 49 (1953); Mudd, *The Social Worker's Function in Divorce Proceedings*, 18 LAW & CONTEMP. PROB. 66 (1953).

⁹⁴ HARPER & SKOLNICK, PROBLEMS OF THE FAMILY 489 (1962); Mudd, *supra* note 93, at 70.

⁹⁵ See, *supra* note 69.

4. *Insanity*

The insanity defense flows logically from the fault theory, for legally an insane spouse cannot be guilty of a marital offense. An additional public policy consideration which may have influenced the introduction of this defense is a desire to protect the insane spouse and to assure that he is provided with adequate support and medical attention.⁹⁶ The sane spouse should have the duty to provide such support and special care—but not by refusing to terminate the matrimonial bonds.

Nebraska has statutory provisions for the appointment of a guardian ad litem to protect an insane spouse's interests.⁹⁷ The court has the power to enforce the support duty, regardless of the existing marital status, and no advantage accrues from the refusal to grant a divorce decree.⁹⁸

It is difficult to understand how an actual marriage relationship can be said to exist under such circumstances despite judicial refusal to separate the parties legally. The insane spouse is incapable of participating in an on going marriage relationship, such as rearing children, providing for the family's security, and providing marital companionship. The sane spouse, unless he can prove incurable insanity as a ground for divorce,⁹⁹ is tied to a partner who can contribute nothing to a successful marriage.

V. CAUSES OF DIVORCE

An examination of its consequences has shown that the fault approach to divorce problems has failed to provide a satisfactory solution. The reason it has failed stems from the erroneous assumption that the grounds enumerated in the statutes are the causes of marriage failure. In reality, the causes of marital disintegration are complex and so dependent upon the emotional makeup of the individual spouses that it is impossible to isolate a single factor and say that it is the cause of a given marriage failure.¹⁰⁰

Furthermore, sociological studies and statistical analyses of the factors which are likely to be involved in destroying a marriage show no similarity to the present statutory grounds. Such

⁹⁶ *E.g.*, NEB. REV. STAT. §§ 42-302.02, 42-318.01 (Reissue 1960).

⁹⁷ NEB. REV. STAT. §§ 38-114, 42-302.02 (Reissue 1960).

⁹⁸ NEB. REV. STAT. § 42-318.01 (Reissue 1960).

⁹⁹ NEB. REV. STAT. § 42-301 (Reissue 1960).

¹⁰⁰ See notes 34 & 35 *supra*.

studies show, for example, that:¹⁰¹ (1) marriages contracted within a short time after the spouses meet are more likely to end in divorce than if they had known each other for a year or two; (2) marriages across class lines meet serious problems of adaptation which results in a higher probability of divorce; (3) interfaith marriages are more likely to fail; (4) children of an unhappy marriage encounter greater difficulties in the marriage relationship than children of a happy marriage; and (5) where both spouses want children and children are born, the marriage is less likely to end in divorce.

From these sociological studies, the legal grounds emerge as symptoms that the marriage has failed rather than as actual causes of the failure. Since the present legal grounds are merely symptoms of marital breakup, and the actual causes are too complex to be reasonably made legal grounds, the proper approach to sound divorce regulation should involve an examination of the soundness of the relationship itself. An attempt should be made by the court to determine whether reconciliation is possible, for research indicates that many of the present divorces could be prevented through effective marriage counseling.¹⁰² Should it be determined that reconciliation is not a proper solution, marital ties should be severed with as little pain as possible. It is with the dual intention of facilitating reconciliation and providing an effective remedy where attempted reconciliation would not solve the marital difficulties, that the recommendations of the following section are advanced.

VI. RECOMMENDED DIVORCE PROVISIONS FOR NEBRASKA

A. The opportunity to contract a hasty marriage has been shown to be a contributing factor to a high divorce rate.¹⁰³ It is, therefore, recommended, that there be a required waiting period from the time of application for a marriage license until the time when marriage could be contracted. Such period should be of sufficient duration to reasonably forestall marriages contracted without adequate consideration by the parties. An additional requirement providing for consultation with a marriage counselor during the waiting period would be beneficial. A visit to a professional marriage counselor would increase the prospective spouses' awareness of the problems which the marriage relationship would face. It would allow them to more completely understand where personality

¹⁰¹ MERTON & NISBET, *op. cit. supra* note 87, at 425.

¹⁰² HARPER & SKOLNICK, *op. cit. supra* note 94, at 70.

¹⁰³ MERTON & NISBET, *op. cit. supra* note 87, at 425.

clashes are likely to occur and to re-examine the desirability of marriage in the light of such knowledge.¹⁰⁴

B. All legal grounds presently required for divorce and all defenses to an action for divorce should be abandoned, and the fault theory replaced by a concept based upon the welfare of the parties involved. This would reduce the strife during the action because neither party would be charged with guilty conduct. Such charges tend to lead to counter charges and a corresponding increase in tensions not conducive to effective reconciliation attempts. If the court finds that divorce would be likely to promote the welfare of the spouses and their children, the divorce should be granted whether or not either or both spouses are guilty of a marital offense.

C. The first step in a divorce action should be the filing of intention to petition for divorce with the court by either or both parties. This notice should contain the bare statement of intention with no allegations of guilt. Filing of *intention* contrary to filing a petition for divorce would not be an act of such finality that the parties would feel constrained to proceed to final dissolution, and they would consequently be in a better mental state to consider a reconciliation.

D. Upon the filing of intention the court should appoint a social case worker, a member of the court's permanent staff, to investigate the family background, the desirability of granting custody of any children to a particular spouse, the support requirements of the children and the wife, and the ability of the husband to provide support. A report of these factors should be filed with the court and become part of the evidence to reduce much of the present conflict which is involved in the determination of these questions. In this way neither spouse would feel that the other was attempting to use the proceedings for monetary gain or revenge.

E. After filing the notice of intention, neither spouse should be permitted to petition for divorce during a waiting period of six months. During this period the spouses should be required to meet individually and together with a professional marriage counselor, a member of the court's permanent staff, to obtain guidance toward a satisfactory reconciliation. After six months the marriage coun-

¹⁰⁴ This restriction might be open to the objection that it provides no remedy for the pregnant single girl. However, this would appear to be one of the areas where hasty, ill-considered marriages occur with a high rate of frequency. It would appear, therefore, that it might be better for the child to be born out of wedlock than to put three people in the corrosive situation which occurs in marriages which are not firmly based.

selor should file a report with the court indicating whether or not divorce would be advisable, and if the time was insufficient to complete counseling, the court could, in its discretion, extend the waiting period an additional six months. This requirement would provide the spouses with an opportunity to understand the factors which are involved in the marriage conflict and to assess the advisability of pursuing a remedy other than divorce.

F. At the end of the waiting period either or both of the spouses could petition for divorce. The petition should state the date on which notice of intention was filed, that an attempt had been made to effect reconciliation, and that divorce is still desired.

G. As soon as possible after the petition for divorce, the court should hold a closed hearing to determine the advisability of terminating the marriage. Because it is a closed hearing, the spouses would be more likely to make a full disclosure, whereas, if it were public, one or both might be reluctant to relate facts considered embarrassing or personal. The desire of the spouses and the report of the marriage counselor should control in determining whether or not a divorce should be granted.

H. If the divorce be granted the social case worker's report should be determinative of support, alimony and custody, subject to additional evidence presented by the spouses. The court should, as is presently provided, have continuing jurisdiction to modify such decrees upon a showing of changed circumstances.¹⁰⁵

I. The dissolution should be final as of the date of the decree. The purpose of the waiting period after divorce is to give the parties an opportunity to reconsider, and this has been provided for in recommendation E. above.

J. Where but one spouse is in the jurisdiction, a special provision should provide for the following:

- (1) A filing of notice of intention as provided above.
- (2) The same waiting period as above.
- (3) The absent spouse should be notified of the intention and be given an opportunity to submit to the jurisdiction of the court. If the absent spouse submits to the jurisdiction of the court, the procedure for marriage counseling should be as outlined above.
- (4) If the absent spouse fails to submit to the court's jurisdiction, social case workers should investigate and submit a report

¹⁰⁵ NEB. REV. STAT. §§ 42-312, 42-324 (Reissue 1960).

concerning alimony, support and custody. Alimony and support should be decreed and enforced as is presently provided.¹⁰⁶

(5) At the end of the waiting period where the absent spouse has failed to appear, the divorce would be granted and proper alimony, support and custody decreed.

K. It is further suggested that in both situations the traditional case name be eliminated. Instead of the usual *Doe v. Doe*, which suggests adversary proceedings, the case should be entitled *Divorce of Doe*. This, of course, is not essential; but, divorce under the above plan is not an adversary proceeding and the case name should not indicate that it is.

VII. CONCLUSION

The legal fault requirements are predicated on the erroneous assumption that marriage breakup is a direct result of actions which constitute grounds under present divorce statutes. Initially, fault theory may enforce the marriage bond, but the harmful effects of such enforced marriage may actually lead to increased family instability and emotional strain.¹⁰⁷

The recommendations herein advanced should aid in relieving many of the harmful effects of divorce as they remove family problems from the area of traditional court room litigation. Marriage is primarily a social status, and these recommendations have attempted to approach marital difficulties from the concept of solving a social problem with the sociological and psychological tools available.¹⁰⁸ The cost of this program can hardly be expected to be low, but the interest in promoting the welfare of the family unit is more than sufficient to outweigh the increased administrative costs.

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¹⁰⁶ NEB. REV. STAT. §§ 42-701 to -721 (Reissue 1960).

¹⁰⁷ DESPERT, *op. cit. supra* note 73, at 18.

¹⁰⁸ The suggestions advanced herein are open to the objection that they would constitute an invasion of the individual's privacy. However, the marriage relationship is governed by the laws of the state and exists subject to those laws. The state has an overriding interest in the welfare and social stability of its citizens. The law, as it exists now, has failed in great part to accomplish its goal—the promotion of marital stability. The fault concept with respect to family relationships appears, in fact, to have promoted instability of the marital relationship. No set of laws or rules could provide a final solution to the problem of marital instability, but the suggestions advanced herein allow a more realistic approach to the problem than that of the arbitrary, fault-based, pattern embodied in the present divorce law.